

(2010) 04 GUJ CK 0037
In the Gujarat High Court

Case No : Letters Patent Appeal No. 367 of 2010 in Special Civil Application No. 11009 of 2009, Special Civil Application No. 16707 of 2007, Special Civil Application No. 6665 of 2008, Special Civil Application No. 12 of 2009, Special Civil Application No. 11009 of

Paschim Gujarat Vij Co. Ltd.

APPELLANT

Vs

Paras Ship Breakers Ltd.

RESPONDENT

Date of Decision : 28-04-2010

Acts Referred:

Electricity Act, 2003 — Section 126, 126(5), 126(6), 2(51), 2(70)

Citation : (2011) 2 CivCC 116 : (2010) 2 GLH 626 : (2011) 1 RCR(Civil) 760 : (2011) 1 RCR(Civil) 760

Hon'ble Judges : S.J. Mukhopadhaya, C.J.; Akil Kureshi, J

Bench : Full Bench

Advocate : Lilu K. Bhaya, in LPA No. 367/2010, 6665/2008, CA No. 2172/2010, SCA No. 12/2009 and Harshit Tolia, in SCA No. 16707/2007, for the Appellant; P.C. Kavina, Sr Advocate for Viral K. Shah in LPA No. 367/2010, SCA No. 11009/2009, Lilu K. Bhaya in SCA No. 11009/2009, SCA No. 16707/2007 and Harshit S. Tolia in SCA No. 12/2009, for the Respondent

Final Decision : Dismissed

Judgement

Akil Kureshi, J.—This Letters Patent Appeal has been filed by Paschim Gujarat Vij Co. Ltd.(here-in-after referred to as "the Electricity Company") challenging an order dated 11.11.2009 passed by the Learned Single Judge in Special Civil Application No. 11009/2009. Learned Single Judge admitted the petition and granted interim relief in terms of para. 8(B) of the petition, whereby supplementary bill of Rs. 2,20,09,862/- came to be stayed.

2. Since between the Electricity Company and the present respondent original petitioner, several petitions on the same issue are pending, we decided to hear all the petitions finally instead of tackling the issues at an interim stage.

3. Facts in brief are as follows:

3.1 Respondent herein, original petitioner in Special Civil Application No. 11009/2009, M/s. Paras Ship Breakers Ltd. ("the consumer" for short) is the consumer of the electricity supplied by the Electricity Company. It is not in dispute that the electric connection bearing No. 23246 for a load of 2400 KVA has been granted by the Electricity Company to the consumer for its factory situated in plot No. 5 of land bearing survey No. 50/2. It is also not in dispute that the consumer has been found using the said electricity connection for running a factory in nearby plot Nos. 2/B and 4 which were in the name of Khodiyar Rolling Mills and Paras Ship Breakers respectively. It is also not in dispute that both the said entities were previously consumers of the Electricity Company but their electricity connections on their respective plots were permanently disconnected on account of unpaid electricity dues. It is the case of the Electricity Company that M/s. Paras Ship Breakers Ltd., the consumer has thus utilized its electricity connection unauthorizedly and has committed grave irregularities. This has given rise to series of litigations which form part of the present group of petitions.

3.2 It is the case of the consumer that in plot No. 2/B, Khodiyar Rolling Mills was situated. The consumer had taken over the possession of the said Khodiyar Rolling Mills on rental basis and thereafter, purchased the machinery and subsequently the land also. The consumer had also by a letter dated 24.5.2004 requested the Electrical Inspector to grant extension of the electrical connection in the said newly acquired premises. Once again by letter dated 4.4.2005, the consumer had informed the Electricity Company that it had installed two rolling mills in the premises and purchased new machinery. In view of the permanent disconnection of the electricity supply on the plot on which Khodiyar Rolling Mills was situated at the time when the consumer acquired the plot, there was no electrical installation. It is thus the case of the consumer that by utilising its existing electric connection from plot No. 5 for running its rolling mills in plot No. 2/B or any other plot, the consumer had not committed any irregularity since the consumer is any way paying regularly the electricity bills for electricity consumed by it. Action of the Electricity Company in raising the supplementary bills is wholly unauthorized.

3.3 In Special Civil Application No. 16707/2007, M/s. Paras Ship Breakers Ltd.- the consumer has challenged an order Annexure-A passed by the Appellate authority(Electrical Inspector) in an appeal preferred by the consumer against the supplementary bill issued by the Electricity Company.

Electricity Company had raised additional demand of Rs. 64,08,248/- by issuing bill dated 14.6.2006 on the ground of unauthorized use of electricity. Demand was resisted by the consumer by filing appeal. The Appellate Authority partially allowed the appeal, directed the Electricity Company to recalculate the bill amount upon which the Electricity Company issued a fresh bill of Rs. 21,36,083/-.

In the said petition, Learned Single Judge on 22.7.2008 observing that prima facie there cannot be unauthorized use of electricity by a person for himself and

if the person is using the electricity in the adjacent plot, it will not be unauthorized use admitted the petition and granted order of status-quo in favor of the consumer.

3.4 Special Civil Application No. 6665/2008 is the cross petition filed by the Electricity Company challenging the same decision of the Appellate Authority to interfere with the supplementary bill raised by the electricity company against the consumer.

3.5 Special Civil Application No. 12/2009 has been filed by the Electricity Company. The Electricity Company has challenged an order dated 5.6.2008 passed by the Electrical Inspector in Appeal No. 11/2007 filed by the consumer M/s Paras Ship Breakers Ltd. By the said order, the Electrical Inspector quashed the demand of supplementary bill of Rs. 64,46,556/- raised by the Electricity Company on account of the unauthorized use of electricity by the consumer. The Electrical Inspector was of the opinion that the consumer using the electric connection in the adjacent plot for its rolling mill, did not amount to unauthorized use of electricity, since the electricity was used for its own consumption and not for anyone else. In any case by such use of electricity, no financial loss is caused to the Electricity Company. On this ground, demand was quashed which has been challenged by the Electricity Company in the said petition.

3.6 In Special Civil Application No. 11009/2009, the consumer M/s. Paras Ship Breakers Ltd has directly approached the High Court without preferring appeal against the supplementary bill dated 25.9.2009 raised by the Electricity Company demanding additional amount of Rs. 2,20,09,862/- on the same ground of the consumer using the electricity connection on the plot and for the purpose for which such connection has not been granted.

4. Despite certain factual differences, central issue is common in all the petitions. Pivotal question which calls for consideration is whether the consumer, who had on its own without any permission from the Electricity Company by joining extension wires, used the electricity connection granted by the Electricity Company for a particular plot for industry on another plot, can be stated to have made unauthorized use of electricity.

5. Following undisputed facts emerge from the record:

1) The consumer M/s. Paras Ship Breakers Ltd. has been granted electricity connection No. 23246 on its plot No. 5 with a contract load of 2400KVA.

2) That previously on plot No. 2/B, factory of Khodiyar Rolling Mills was situated. Khodiyar Rolling Mills was also a consumer of the Electricity Company. On account of long pending electricity bills, electric supply was disconnected. Similar was the case with respect to one Paras Ship Breakers whose factory was situated in plot No. 4. There also electricity connection came to be disconnected on account of nonpayment of dues.

3) M/s. Paras Ship Breakers Ltd.-the consumer on several occasions has been

found to be utilizing its electric connection installed on plot No. 5 for running its factory situated on plot No. 2/B and 4. For the above purpose, no permission has been granted by the Electricity Company at any point of time.

4) Though it is the case of the consumer that it had conveyed its acquisition of the premises of plot No. 2/B and its intention to use the electricity connection for running its factory, admittedly, no permission has been granted by the Electricity Company for such use. On the contrary, on several occasions, the Electricity Company has strongly objected to such use of electricity which according to the Company is wholly unauthorized. The Electricity Company has been raiding the premises of the consumer, has been drawing Panchnamas issuing series of supplementary bills on this premise.

6. It is in this background that we need to appreciate the contentions of the counsel for either side.

7. Learned advocate Ms. Lilu K. Bhaya for the Electricity Company drew our attention to the provisions contained in Section 126 of the Electricity Act 2003 ("the Act" for short) to contend that the case of the consumer is squarely covered by the term "unauthorized use of the electricity."

7.1 She further contended that the consumer cannot be permitted to utilize the electric connection for a plot of land on which such connection has not been granted and for the purpose other than for which connection is permitted. She relied on the original application of the consumer on the basis of which electric connection was granted. She submitted that the Electrical Inspector therefore was not justified in interfering with the supplementary bills issued by the Electricity Company.

7.2 She further contended that in the appellate order which is under challenge in Special Civil Application No. 12/2009, the question of jurisdiction of the Electrical Inspector was also raised. She pointed out that during the pendency of the appeal, Government had issued a notification whereby the jurisdiction of the Electrical Inspector to deal with the appeals of the valuation of over Rs. 10 lakhs was taken away. Despite objection taken in writing, the Electrical Inspector heard the appeal on merits holding that such a change would not apply to the pending appeal.

8. On the other hand, learned senior advocate Mr. Kavina appearing for M/s. Para Ship Breakers Ltd. the consumer raised following contentions:

1) There was no illegality in the consumer using the electric connection on the adjacent plot for its own use may be for another plot. He pointed out that sub-clause(b) of clause(v) of Explanation to Section 126 of the Act, was added with effect from 15.6.2007. Since some of the disputed bills pertain to period prior thereto, such change in the statutory provisions will not apply to such cases.

2) On the basis of the communications of the consumer to the Electricity Company regarding acquisition of adjacent plot and its proposal for using

electrical connection for running its factory thereon and in view of no response of the Electrical Company to such communications, Counsel contended that this is a clear case of acquiesce. The Electricity Company not having raised any objection in response to such communications, cannot at a later stage term the use of electricity as unauthorized. He relied on provisions contained in Section 43 of the Act to contend that it is the duty of the Electricity Company to provide electricity connection promptly to the consumer who asks for it.

3) With respect to order dated 9.6.2008 passed by the Electrical Inspector which is challenged in Special Civil Application No. 12/2009, he submitted that lack of jurisdiction of the Appellate Authority should not result into adverse consequences against the consumer since consumer had filed the appeal at the time when the Electrical Inspector had jurisdiction to entertain the appeal.

4) With respect to Special Civil Application No. 11009/2009, he stated that since the petition was filed without availing of remedy of appeal, the petitioner may approach the appellate authority.

9. At this stage we may notice relevant statutory provisions. Section 2(51) of the Act defines "premises" as under:

(51) "premises" includes any land, building or structure;

Term "supply" has been defined in Section 2(70) of the Act as under:

(70) "supply" in relation to electricity, means the sale of electricity to a licensee or consumer.

9.1 Section 126 of the Act authorizes the Assessing Officer to make provisional assessment of electricity charges payable by the consumer or any other person benefited by unauthorized use of electricity if on inspection of the place or premises, he comes to conclusion that such person has indulged in unauthorized use of electricity.

Sub-section (5) of Section 126 provides inter-alia that if the period during which such unauthorized use of electricity has taken place cannot be ascertained, such period shall be limited to a period of 12 months immediately preceding the date of inspection.

Sub-section (6) of Section 126 of the Act provides that assessment to be made under the section shall be at a rate equal to twice the tariff applicable for the relevant category of service specified.

Explanation (b) to Section 126 is of great importance for us and it reads as under:

(b) unauthorized use of electricity" means the usage of electricity

(i) by any artificial means; or

(ii) by a means not authorized by the concerned person or authority or licensee;

or

(iii) through a tampered meter; or

(iv) for the purpose other than for which the usage of electricity was authorized;
or

(v) for the premises or areas other than those for which the supply of electricity was authorized.

10. It can thus be seen that Section 126 of the Act provides for a mechanism to deal with unauthorized use of the electricity. Term "unauthorized use of electricity" has also been explained in clause(b) of the explanation which includes use of electricity by any artificial means or by means unauthorized by the concerned person or authority or the licensee, or used through tampering of meters, or used for the purpose other than for which electricity was authorized. Sub-clause(v) of clause(b) of the explanation in clear terms provides that any use of electricity for the premises or areas other than those for which the supply of electricity was authorized shall also be considered unauthorized use of electricity.

10.1 Thus the use of electricity in many ways not authorized by Electricity Company is categorised as "unauthorized use of electricity." In view of sub-clause (v) of clause (b), there is no doubt in our mind that in the present case, consumer must be stated to have made unauthorized use of electricity. Admittedly, the premises of plot No. 2/B or 4 were not the premises or area on which electricity supply was authorized. Undisputedly, as is apparent from the application of the consumer for obtaining electricity supply, the plot on which such connection was to be granted and was to be used has been clearly specified. When the consumer on its own will without specific permission from the Electricity Company, extended the connection by joining wires and used the same for running its factories, on plot No. 2/B or 4, the consumer clearly made unauthorized use of electricity. We are conscious that sub-clause(v) of clause(b) to the explanation u/s 126 was added by the amending Act No. 26/2007 with effect from 15.6.2007. In all cases arising subsequent to said date therefore, by virtue of said clause, our task has become quite simple.

10.2 Question is even before the said sub-clause was added, whether legal position as obtaining from the then existing statutory provisions would render such a use unauthorized use of electricity. Clause(b) to the explanation uses the words "unauthorised use of electricity means" and not "means and includes".

10.3 In case of S. Sundaram Pillai and Others Vs. `R. Pattabiraman and Others, the Apex Court discussed the impact of an explanation in a statutory provision and held and observed as under:

45. We have now to consider as to what is the impact of the Explanation on the proviso which deals with the question of wilful default. Before, however, we embark on an enquiry into this difficult and delicate question, we must

appreciate the intent, purpose and legal effect of an Explanation. It is now well settled that an Explanation added to a statutory provision is not a substantive provision in any sense of the term but as the plain meaning of the word itself shows it is merely meant to explain or clarify certain ambiguities which may have crept in the statutory provision. Sarathi in "Interpretation of Statutes" while dwelling on the various aspects of an Explanation observes as follows:

(a) The object of an explanation is to understand the Act in the light of the explanation.

(b) It does not ordinarily enlarge the scope of the original A section which it explains, but only makes the meaning clear beyond dispute.

46. Swarup in "Legislation and Interpretation" very aptly sums up the scope and effect of an Explanation thus:

Sometimes an explanation is appended to stress upon a particular thing which ordinarily would not appear clearly from the provisions of the section. The proper function of an explanation is to make plain or elucidate what is enacted in the substantive provision and not to add or subtract from it. Thus an explanation does not either restrict or extend the enacting part; it does not enlarge or narrow down the scope of the original section that it is supposed to explain .. The Explanation must be interpreted according to its own tenor; that it is meant to explain and not vice versa.

52. Thus, from a conspectus of the authorities referred to above, it is manifest that the object of an Explanation to a statutory provision is-

(a) to explain the meaning and intendment of the Act itself,

(b) where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to subserve,

(c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful,

(d) an Explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the Court in interpreting the true purport and intendment of the enactment, and

(e) it cannot, however, take away a statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming an hindrance in the interpretation of the same.

10.4 In case of *Keshavji Ravji and Co. etc., etc. v. Commissioner of Income Tax* reported in : AIR 1991 Supreme Court 1806 the Apex Court observed as under:

...An "Explanation", generally speaking, is intended to explain the meaning of

certain phrases and expressions contained in a statutory provision. There is no general theory as to the effect and intendment of an Explanation except that the purposes and intendment of the "Explanation" are determined by own words. An Explanation, depending on its language, might supply or take away something from the contents of a provision. It is also true that an Explanation may--this is what Sri Ramachandran suggests in this case--be introduced by way of abundant--caution in order to clear any mental cobwebs surrounding the meaning of a statutory provision spun by interpretative errors and to place what the legislature considers to be the true meaning beyond controversy or doubt. Hypothetically, that such can be the possible purpose of an "Explanation" cannot be doubted.

10.5 Coming back to the question on hand, we find that Section 126 of the Act seeks to curb unauthorized use of electricity by any person. Such consumption through unauthorized use is charged at double the normal tariff. Explanation (b) to Section 126 even prior to addition of sub-clause(v) therein included variety of uses of electricity not authorized by the Company in the term "unauthorized use of electricity". Considering the scheme of Section 126 and the object sought to be achieved, it can be clearly seen that the explanation finds place not by way of a substantive provision but merely to explain or clarify or remove ambiguities if any, in the statutory provision and to provide an additional support to the dominant object of the Section. By providing explanation(b) to Section 126, the legislature did not intend to limit in any manner the import of the term "unauthorized use of electricity" used in Section 126. Seen from this angle, it becomes clear that addition of sub-clause(v) in the explanation clause(b) to Section 126 of the Act was only a declaratory or clarificatory amendment in nature and would apply to and cover all cases whether arising before or after the said sub-clause(v) was introduced.

10.6 Quite apart from the above conclusion that we have reached we are of the opinion that case of the consumer would also fall under sub-clause(iv) of Clause(b) of the explanation namely "for the purpose other than for which the usage of electricity was authorised-

From the original application filed by the consumer for grant of electricity connection, it can be seen that in item No. 13 to a question "Whether supply is asked for (i) expansion or (ii) extension of the existing industry or (iii) for altogether anew industry in the State, the consumer had stated "New Industry". The exact location (namely plot No. 5) where the factory of the consumer was situated was also indicated along with the said application. Thus the purpose for which electricity connection was demanded and granted was for setting up a new industry in plot No. 5. Any other use would be covered also under Sub-clause(iv) of clause(b) of the explanation namely "for the purpose other than for which the usage of electricity was authorised.

10. On this basis, we are of the view that this is a clear case of unauthorized use of electricity covered u/s 126 of the Act. We may recall that the erstwhile

consumers namely Khodiyar Rolling Mills and Paras Ship Breakers who had factories situated in plot No. 2/B and 4 respectively had defaulted in paying their electricity bills. Their electricity connections were therefore, disconnected. In ordinary circumstances, by virtue of agreement between the parties, particularly, if those consumers had sold their plots to some other entities through private negotiations, the Electricity Company would have resisted granting any new electric connection on such premise without the past dues being paid up in to either by the previous owner or by the new purchaser. If we were to accept the contention of the consumer that all that the consumer has done is an innocuous extension of electricity connection in a neighboring plot, use of which is being enjoyed by the same consumer for which the consumer also pays the full electricity charges, we would be negating and totally bypassing the right of the Electricity Company to seek full recovery of its past dues of electricity before granting new electrical connection on the same premises.

11. We also cannot lose sight of the fact that the Electricity Companies have to manage their affairs on the basis of estimated demand of electricity. Such estimation can be made only on the basis of particular load authorized to the consumer. Permitting such extensions without any restrictions would result into as has happened in the present case, drawing of electricity in excess of authorised load. Such rampant use would effectively destroy all the estimates of the company. Electricity Company cannot operate under rampant overdrawal of authorized load.

12. Contention that there was acquiesce on behalf of the Electricity Company needs to be noted only for rejection. Admittedly, there was no permission or authorization by the Company to the consumer to extend the electrical connection. On the contrary, premises of the consumer were raided repeatedly and supplementary bills were raised. This is certainly not a case of acquiesce.

13. With respect to the order dated 5.6.2008 by the Electrical Inspector, we find that by notification dated 1.9.2007, the Government superseded its earlier notification dated 10.1.2005 and in case of appeals involving amount of above Rs. 10 lakhs, designated Deputy Chief Electrical Inspector as the Appellate Authority. In view of the said notification, the Electrical Inspector lost the pecuniary jurisdiction to entertain the appeal which was admittedly involving stakes of more than Rs. 10 lakh. This in our view was a procedural change and would apply to all pending appeals. Electrical Inspector therefore, ought not to have heard Appeal No. 11/2007 of the consumer on merits thereafter. In fact, the Electricity Company raised its written objections in this regard. Such objection was however turned down by the Electrical Inspector by order dated 8.4.2008 observing that the said Government notification would not apply to appeals which were already filed previously. We find that the Electrical Inspector committed a serious error in proceeding with the appeal even after he was divested of pecuniary jurisdiction to decide the same. Contention of the counsel for the consumer was that the said order dated 8.4.2008 not having been

challenged by the Electricity Company, said issue cannot be raised in the present proceedings. Said contention cannot be accepted. Firstly, order dated 8.4.2008, was an interlocutory order and eventually merged in the final order disposing of the appeal. Secondly, the issue goes to the root of the matter namely, to the very jurisdiction of the appellate authority to decide the appeal. On this additional ground also the appellate order is required to be quashed. Ordinarily, we would have permitted the consumer to approach the appropriate Appellate Authority. However, in view of our conclusion in this order, issue of unauthorized use of electricity gets finally decided in this litigation. No useful purpose would therefore, be served in remanding the appeal for fresh consideration.

14. We may recall that in Special Civil Application No. 16707/2007, the consumer has challenged order dated 19.2.2007 passed by the Electrical Inspector. Same order to the extent it is adverse to the Company has been challenged in Special Civil Application No. 6665/2008. We find that the Electrical Inspector, having accepted the case of unauthorized use of electricity by the consumer, interfered with the disputed bill on other grounds which were not tenable. The Electrical Inspector relied on the meter installed by the consumer on its furnace to hold that such consumption should be excluded from consideration of unauthorized consumption.

We find that the approach of the Electrical Inspector was wholly incorrect. It is undisputed that the meter installed on the furnace was purchased by the consumer and was not supplied by the Company. Reading recorded by such a meter cannot form the basis for segregating the consumption of electricity.

The Company in its petition has taken following ground in this respect:

(e) The Learned Appellate Authority has failed to appreciate that only the energy meter(TVM) installed by the petitioner is considered to be standard apparatus to measure energy because this apparatus is checked from time to time in the premises of the consumers by the officials of the petitioner. No other meter present in the premises of the consumer is taken in consideration except meter installed by the petitioner because the meter installed other than the petitioner are purchased and installed by the consumer themselves for getting various benefits like electricity duty exemption, D.G. Set, Office Lighting, recording, factory lighting recording, etc. The reading of furnace meter considered by the learned Appellate Authority is totally misleading since the said furnace meter is not tested or sealed by the petitioner. The respondent No. 1 had failed to produce any sealing certificate in respect of the said furnace meter.

No reply has been filed refuting the averments. Even otherwise factual aspects are not in dispute. We uphold the said objection, conclude that interference by the Electrical Inspector in this case was uncalled for. The order is therefore, quashed.

15. In the result, we are of the opinion that orders passed by the Electrical Inspector to the extent same are against the Electricity Company, need to be

quashed.

16. In Special Civil Application No. 11009/2009, there is no appellate order. The consumer has approached the High Court directly without preferring Appeal. If the consumer so wishes, it will be open for the consumer to prefer Appeal to which we express no opinion.

17. In the result all the proceedings are disposed of in following terms:

1. Special Civil Application No. 6665/2008 is allowed. Order of the Electrical Inspector under challenge is quashed.

2. Counter petition of the consumer being Special Civil Application No. 16707/2007 is dismissed.

3. Special Civil Application No. 12/2009 filed by the Electricity Company is allowed. Impugned order dated 5.6.2008 passed by the Electrical Inspector is quashed.

4. Special Civil Application No. 11009/2009 is dismissed, leaving it open to the consumer to explore the possibility to approach the appellate authority.

5. In view of above orders, no further order is necessary in Letters Patent Appeal No. 367/2010. Same is disposed of.

6. Civil Application also stands disposed of accordingly.

7. No cost.